

**UNITED STATES OF MERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**SELECT TEMPORARIES, LLC**

**and**

**Case 31–CA–157821**

**DIOSELIN GRAY, an Individual**

*Thomas Rimbach, Esq.,  
for the General Counsel.  
Timothy Hix, Esq., and Jeffrey Berman, Esq.  
(Seyfarth Shaw LLP), of Los Angeles, California,  
for the Respondent.*

**DECISION**

**STATEMENT OF THE CASE**

DICKIE MONTEMAYOR, Administrative Law Judge. This is another case involving mandatory arbitration agreements. The charge in this matter was filed by Dioselen Gray, an individual (the Charging Party) on August 11, 2015, against Select Temporaries, LLC (the Respondent). A complaint issued on January 29, 2016. The issues are: (1) whether Respondent's maintenance and enforcement of arbitration agreements to preclude employees from pursuing employment related claims on a class or representative basis in judicial or arbitral forums is unlawful under Section 8(a)(1) of the Act, and (2) whether Respondent violated Section 8(a)(1) of the Act by maintaining arbitration agreements that would reasonably be construed to prohibit employees from engaging in conduct protected by Section 7 of the Act and that interfere with access to the Board and its processes. This case therefore raises issues related to the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

Respondent filed an answer denying the material allegations of the complaint and raised certain affirmative defenses, as discussed below. A hearing in this matter was not held. Instead the parties filed a joint motion to have the case decided based upon the stipulated record. (Jt. Exh. 1). On April 13, 2016, the motion was granted and on May 18, 2016, the parties filed posthearing briefs. Thereafter on June 2, 2016, Respondent filed a request for Administrative

Notice to which the General Counsel on June 8, 2016, filed a response. After considering the entire record and the briefs filed by the parties, I make the following

## FINDINGS OF FACT

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### I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Santa Barbara, California. During the 12-month period ending July 31, 2015, Respondent in conducting its operations purchased and received at its Santa Barbara, California facility, goods and services valued in excess of \$50,000 directly from points outside the State of California. I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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### II. ALLEGED UNFAIR LABOR PRACTICES

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The parties entered into a stipulation of facts which was identified as Joint Exhibit 1 and set forth the following:

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1. The charge in this proceeding was filed by Gray on August 11, 2015, and a copy was served on the Respondent by regular mail on August 12, 2015. (Jt. Exh. 2).

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2. The General Counsel of the Board, by the Regional Director for Region 21, acting pursuant to the authority granted in Section 10(b) of the Act and Section I 02.15 of the Board's Rules and Regulations, issued a complaint against the Respondent on January 29, 2016, together with a notice of hearing. A copy of this complaint and notice of hearing is attached as Joint Exhibit 3. True copies of the complaint and notice of hearing were served by certified mail on the Respondent and Gray on January 29, 2016.

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3. An answer to the complaint was filed by the Respondent with the Regional Director for Region 21, and a copy was served on Daniel Bass, counsel for Gray, on February 21, 2016. (Jt. Exh. 4).

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4. An amended answer to the complaint was filed by the Respondent with the Regional Director for Region 21, and a copy was served on Daniel Bass, counsel for Gray, on April 1, 2016. (Jt. Exh. 5).

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5. (a) At all material times, the Respondent, a California corporation, with principal offices and a place of business located at 3820 State St., Santa Barbara, California, has been engaged in the business of providing staffing services.

(b) During the 12-month period ending July 31, 2015, a representative period, the Respondent, in conducting its business operations described above in paragraph 5(a), performed services valued in excess of \$50,000 in States other than the State of California.

6. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. (a) At the time the Respondent, by Johnny Alvarez (“Alvarez”), sent Gray a new hire packet, in about November 2010, Alvarez held the position of branch manager for the Respondent. Alvarez currently holds the position of area vice president for the Respondent. During the periods of time that Alvarez held the positions of branch manager or area vice president for the Respondent, he has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.

(b) From about February 2008 through December 31, 2015, David Trent held the position of director of human resources for the Respondent, and during that period of time was a supervisor of the Respondent within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.

8. About November 29, 2010, after Gray had received and accepted an oral offer of employment, the Respondent, by Alvarez, emailed Gray a new hire packet which contained, among other things, two Mutual Agreements to Arbitrate (“Agreements”). About November 29, 2010, Gray electronically initialed the Agreements, and Gray and Alvarez electronically signed and dated the new hire packet containing the Agreements. (Jt. Exh. 6).

9. About November 29, 2010, the Respondent, by Alvarez, emailed Gray a document titled “Personnel Practices Agreement,” along with the new hire packet referenced above in paragraph 8. About November 29, 2010, Gray electronically initialed the Personnel Practices Agreement. (Jt. Exh. 7).

10. From at least about November 29, 2010, through about June 1, 2012, Gray was employed by the Respondent.

11. About July 11, 2013, Gray filed a class-action and representative-action complaint against the Respondent in the Superior Court of the State of California, County of Los Angeles, Central District (“Superior Court”), in *Dioselin Gray v. Select Temporaries, Inc.* (Case No. BC514799). (Jt. Exh. 8).

12. About February 11, 2015, the Respondent filed a Notice of Petition and Petition for an Order to Compel Arbitration (“Petition”), seeking: (1) to compel arbitration of Gray’s individual claims; (2) to dismiss Gray’s class claims in accordance with the terms of the Agreements; and (3) to bifurcate Gray’s claims under the California Labor Code’s Private Attorneys General Act (“PAGA”) and to stay the proceedings pending arbitration of Gray’s individual claims. The Respondent filed the following documents concurrently with the Notice of Petition and Petition: Declaration of David Trent in Support of Petition to Compel Arbitration; Declaration of Johnny Alvarez in Support of Petition to Compel Arbitration; Declaration of Daniel Whang in Support of Petition to Compel Arbitration; Defendant Select Temporaries, LLC’s Request for Judicial Notice; and Proposed Order Granting Defendant’s Petition for an Order to Compel Arbitration. Copies of the Notice of Petition, Petition, and the documents listed above were filed concurrently with the Petition. (Jt. Exh. 9).

13. About February 13, 2015, the Superior Court issued a minute order acknowledging receipt of the Respondent’s Petition. (Jt. Exh. 10).

14. About March 12, 2015, Gray filed Plaintiff’s Opposition to Defendant’s Petition for Order to Compel Arbitration and Declaration of Matthew J. Matern in Support Thereof. (Jt. Exh. 11).

15. About March 18, 2015, the Respondent filed Defendant’s Reply in Support of Petition for an Order to Compel Arbitration; Evidentiary Objections to the Declaration of Matthew J. Matern; and Supplemental Declaration of Daniel Whang in Support of Petition to Compel Arbitration. (Jt. Exh. 12).

16. About July 1, 2015, the Superior Court issued an order: (1) granting the Respondent’s Petition, with the exception of the PAGA claims; (2) striking Gray’s class allegations; and (3) staying the resolution of the PAGA claims, pending arbitration of Gray’s individual claims. (Jt. Exh. 13).

17. About August 25, 2015, Gray filed a Notice of Appeal of the Superior Court’s July 1, 2015 order. (Jt. Exh. 14). Gray’s appeal is pending before the California Court of Appeal, Second Appellate District, Division 8 (Case No. B266379), and an opening brief has not yet been filed.

18. At all material times, the Respondent has distributed to and maintained for its employees the new hire packet containing the Agreements referenced above in paragraph 8. The Respondent does not and will not contend that any of the allegations in the complaint in this case are barred by Section 10(b) of the Act.

19. The Parties acknowledge that the record contains no evidence of any employee or employment applicant being adversely affected as a result of refusing to sign the Agreements or for filing an unfair labor practice charge with the Board. The General Counsel acknowledges that he is aware of no evidence to the contrary.

5 The arbitration agreements in their entirety provided as follows:

The first arbitration agreement was in a document entitled “Legal Acknowledgements Applicant Agreement,” and set forth the following language:

#### 10 MUTUAL AGREEMENT TO ARBITRATE

If The Employer and I are unable to resolve any disputes informally, I agree to having the dispute submitted and determined by binding arbitration in conformity with the procedures of the Federal Arbitration Act and the California Arbitration Act (California Code of Civil Procedure section 1280, et. seq.), including section 1283.05 and all other rights to discovery. Such disputes may include but not [be] limited to any involving breach of contract, fraud, misrepresentation, defamation, personal injury, wages, wrongful discharge, vacation pay, sick time pay, overtime pay, state and federal employment laws, and regulation including but not limited to the Fair Labor Standards Act (including the equal Pay Act), the Civil Rights Act of 1964 as amended, 42 U.S.C. section 1981, the Americans with disabilities Act, laws prohibiting discrimination by reason of religion, sex, age, color, national origin, handicap, disability, medical condition, marital status or other basis, ADEA, federal and state, state unfair competition or unfair business practices provisions, and those claims whether in law or equity, which either party could assert, at common law or under statute, rule, regulation, order of law, whether federal, state, or local, except for those under the National Labor Relations Act, claims for workers’ compensation and unemployment insurance, and any other claims precluded from arbitration by law. I agree that such arbitration will be conducted in Santa Barbara, CA. (Jt. Exh. 6, p. 3)

The second arbitration agreement was in a document entitled: “Acknowledgements of Staff Personnel Policies” and provided as follows:

If Select Staffing [the Respondent] and I are unable to resolve any dispute informally, I agree to having the dispute submitted and determined by binding arbitration in conformity with the procedures of the Federal Arbitration Act and the California Arbitration Act (California [C]ode of Civil Procedures section 1280, et. seq.), including section 1283.05 and all other rights to discovery. Such disputes may include but not [be] limited to any involving breach of contract, fraud, misrepresentation, defamation, personal injury, wages, wrongful discharge, vacation pay, sick time pay, overtime pay, state and federal employment laws, and regulation including but not limited to the Fair Labor Standards Act (including the Equal Pay Act), the Civil Rights Act of 1964 as amended, 42 U.S.C. section 1981, the Americans with Disabilities Act, laws prohibiting discrimination by reason of religion, sex, age, color, national origin, handicap, disability, medical condition,

marital status or other basis, ADEA, federal and state, state labor code provisions, the Family and Medical Leave Act, the Employee Retirement Income Security Act (ERISA), and any amendments thereto, state unfair competition or unfair business practices provisions, and those claims whether in law or equity, which either party could assert, at common law or under statute [sic], rule, regulation, order of law, whether federal, state, or local. (Jt. Exh. 6. p.4).

### III. Analysis and Conclusions

The General Counsel and the Charging Party assert that this matter is controlled by the Board's holding in *D. R. Horton*, 357 NLRB 2277 (2012), denied enforcement in relevant part 737 F.3d 344 (5th Cir. 2013). See also *Murphy Oil*, 361 NLRB No. 72 (2014). In these cases, the Board recognized that "collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act]." *D. R. Horton*, supra, at 2279. The Board also found that collective redress in legal and/or administrative settings are "not peripheral but central to the Act's purposes" and that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions.

The General Counsel contends that, "the New hire Packet's clear and unambiguous language shows that the agreements were mandatory conditions of employment." (GC Br. at 9 ). General Counsel further asserts that the mandatory arbitration agreements were identified as "required" documents and that Respondent "requires" employees to sign the "Legal Acknowledgement" as a condition of employment. Despite the fact that Respondent's arbitration policy was silent as to whether employees specifically have the right to file collective or class claims in both judicial and arbitral forums, General Counsel asserts that Respondent's policy is unlawful and violates Section 8(a)(1) of the Act because Respondent itself applied the agreements to restrict employees' Section 7 rights by filing its petition to compel arbitration in the Superior Court on February 11, 2015. (GC Br. at 11).

Respondent asserts that the Board's decision in *D. R. Horton* was wrongly decided, that the rationale of *D. R. Horton* should not apply to the facts presented because it contends that "this is not a *D.R. Horton* case." More specifically, Respondent contends that its arbitration agreement was part of a "bilateral voluntary arbitration program not imposed as a condition of employment" and that it is consistent with the FAA. (R. Br. at 2). Respondent further asserts that the remedies sought by the General Counsel are improper. (R. Br. at 5).

#### A. *D. R. Horton and Murphy Oil Are Controlling*

Respondent, relying in part on the Supreme Court's decision in *CompuCredit v. Greenwood*, 565 U.S. 95 (2012), argues that *D. R. Horton* and *Murphy Oil* were both wrongly decided and

should not be controlling in this matter. Respondent further argues that the Board has failed to give appropriate deference to the FAA as set forth in *CompuCredit v. Greenwood*, 562 U.S. 95, (2012) and that other courts have rejected the Board’s holding in *D. R. Horton*. Similarly, Respondent argues that the Board’s position contradicts Section 9(a) of the Act. At the outset, it must be noted that I am bound by *D. R. Horton* and *Murphy Oil* until either the Board or the Supreme Court overturns them.<sup>1</sup> *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (it is the “judge’s duty to apply established Board precedent which the Supreme Court has not reversed” and “for the Board, not the judge, to determine whether precedent should be varied.”) (citation omitted); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), *enfd.* 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004). In view of this obligation, Respondent’s disagreement with the legitimacy of the Board’s holding in *D. R. Horton* and *Murphy Oil*, and its assertions that the Board’s actions were misguided, or do not give proper deference to the FAA or *CompuCredit* are more appropriately addressed to the Board itself.

#### B. *The Arbitration Agreements Were Conditions of Employment*

A preponderance of the evidence supports the conclusion that the arbitration agreements were in fact conditions of employment. As noted above, it is undisputed that both were provided to Charging Party in the new hire packet and that the language of the packet specified that it contained “required documents” and noted that new hires were to “initial where indicated and provide an electronic signature where requested.” They were further instructed that the mandatory arbitration field was in fact a “required field” to initial. The documents themselves suggest that the arbitration agreements were conditions of employment. One of the documents is titled “Acknowledgement of Staff Personnel Policies” and includes with it other conditions of employment including rules regarding paychecks, and dress codes. Furthermore, there is no information on the face of the documents that would clearly indicate that the arbitration agreements were not a condition of employment or that the new hires could be employed if they didn’t initial the portions related to the arbitration agreements.

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<sup>1</sup> While this case was pending, the seventh circuit and ninth circuit issued decisions which both agreed with the Board’s reasoning and rationale in *D. R. Horton* finding similar arbitration agreements unlawful. The seventh circuit court specifically noted that the Board’s interpretation and application of the law in *D. R. Horton* was a “sensible way to understand the statutory language.” See *Lewis v. Epic Systems Corp.*, No. 15–2997, 2016 WL 3029464 (7th Cir. May 26, 2016). The ninth circuit noted, “the intent of Congress in § 7 is clear and comports with the Board’s interpretation of the statute.” *Morris v. Ernst & Young, LLP*, No. 13–16599, 2016 WL 4433080, at 4 (9th Cir. Aug. 22, 2016).

I find that given these facts and in this context, a newly hired employee would have reasonably believed that initialing the agreements was a condition of employment. *Network Capital Funding Corp.*, 363 NLRB No. 106 (2016), *Haynes Building Services*, 363 NLRB No. 125 (2016).

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*C. The Agreements are Unlawful Regardless of Whether  
or not They are Conditions of Employment*

10 Subsequent to the Board’s decisions in *D. R. Horton* and *Murphy Oil*, the Board held that so called “optional agreements” also violated the Act. In *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), the Board held that such agreements are unlawful despite not being conditions of employment because they force employees to “prospectively waive their Section 7 right to engage in concerted activity.” Therefore assuming for the sake of argument that the  
15 mandatory arbitration agreements were not conditions of employment, as Respondent asserts, the agreements were nevertheless still unlawful applying the reasoning and rationale set forth in *On Assignment Staffing Services* and its progeny. See also *Bloomington’s, Inc.*, 363 NLRB No. 172 (2016).

20 *D. The Agreements are Unlawful Despite The Absence of a Class Action Waiver*

Respondent argues that because the agreements do not specifically include a class action waiver and are silent regarding class or collective actions, Gray “retained the right to engage in class or collective actions.” (R. Br. at 15). This seems to directly contradict the position  
25 Respondent took in the Superior Court litigation in which it specifically sought to compel arbitration. In its Notice of Petition, Respondent clearly asserted that “the arbitration agreements do not permit plaintiff to arbitrate her claims on behalf of a class” and further specifically moved to dismiss the class claims. (Jt. Exh. 9 Memorandum of Points p. 1). Regardless of this inconsistency, the Board has repeatedly held that a mandatory arbitration agreement is unlawful  
30 if, despite its silence regarding class or collective actions, the employer has used the agreement to preclude employees from pursuing class or collective employment related claims in any forum. See *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), see also *Haynes Building Services*, 363 NLRB No. 125 (2016); *Fuji Food Products*, 363 NLRB No. 118 (2016), *Adriana’s Insurance Services, Inc.*, 364 NLRB No. 17 (2016). See also *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), holding that a workplace rule that doesn’t explicitly  
35 restrict protected activity can be unlawful if the rule is applied to restrict the exercise of Section 7 rights.

It is undisputed in the record that Respondent sought not to only compel arbitration but also  
40 to dismiss the class allegations of Charging Party’s wage and hour class action lawsuit. In

*Murphy Oil*, the Board noted that “it is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights.” See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). It is readily apparent that Respondent’s enforcement of the unlawful agreement was a directed effort to restrict the exercise of Charging Party’s Section 7 rights. Accordingly, Respondent’s February 11, 2015, petition to compel arbitration and its March 18, 2015, reply in support of its petition to compel arbitration violated the Act.

*E. Respondent Violated Section 8(a)(1) by Maintaining its Arbitration Policy*

Respondent disputes that the right to engage in class or collective action is protected, concerted activity under Section 7 of the Act. This argument ignores a long history of Supreme Court, and Board precedent. In *Eastex Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), the Supreme Court held that the “‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” In *Le Madri Restaurant*, 331 NLRB 269, 275 (2000), the Board held that the filing of civil suit by employees is protected activity. The Board addressed the question directly in *D. R. Horton* noting specifically that the Board has long held that concerted legal action addressing wages, hours, and working conditions, whether, in a civil suit, before an administrative agency, or through arbitration, all constitute concerted protected activities under Section 7 of the Act. *D. R. Horton*, supra at 2278–2279.

Respondent also asserts that because one of the agreements contained language that “carved out” the employees’ right to file charges with the NLRB, it “effectively allowed Gray to exercise her rights outside of the arbitration agreement.” (R. Br. at 11). Respondent’s argument overlooks the undisputed fact that the second agreement doesn’t contain the same language and in fact mandates that “all claims and controversies” including but not limited to those involving “state and federal employment laws” and “federal and state labor code provisions” be arbitrated. The two agreements appear to conflict and create unmistakable ambiguity regarding whether or not the employee can or cannot file charges with the Board. The Board construes such ambiguity against the drafter. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enf’d. 203 F.3d 52 (D.C. Cir. 1999). Undeniably, the language in the second arbitration agreement and the ambiguity it creates could “reasonably lead employees to believe that they had no right to file charges with the Board” and therefore violates Section 8(a)(1) as alleged in the complaint. See *Bloomingtondale’s*, 363 NLRB No. 172, slip op. at 5. See also *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip. op. at 2 (2016).

*F. Respondent’s Other Defenses*

Respondent asserts various other reasons why it believes the complaint should be dismissed. Respondent argues that Gray elected her remedy, the Superior Court is an indispensable party, and that Respondent’s enforcement of the agreements is protected by the First Amendment. Respondent also contends that even if it were found to have violated the Act, the remedies requested were not proper. I find that each of these other defenses lack merit and decline Respondent’s invitation to limit the scope of remedies requested.

Respondent appears to suggest in crafting its “other defenses” that established Board law should be overruled. For example, the Respondent argues that its petition to compel arbitration is protected by the First Amendment. This very same First Amendment protection argument was directly addressed by the Board in *Murphy Oil*, which held that lawsuits enjoy no First Amendment constitutional protection if they have “an objective that is illegal under federal law.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 27. See also, *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983). Just as in *Murphy Oil*, the facts of this case establish that Respondent’s efforts to preclude class or collective legal actions enjoy no First Amendment protection because the objective was unlawful under Federal law.

I am not persuaded by Respondent’s assertion that Gray’s complaint should be dismissed because she “elected” her remedy. Respondent appears to assert that because Gray filed a State court class action, she elected her remedy and thus should be precluded completely from accessing the Board’s processes.

The doctrine of election of remedies refers to situations where an individual pursues remedies that are legally or factually inconsistent. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). I find no factual or legal inconsistency in Gray’s opposition to Respondent’s petition to compel arbitration in this matter. No inconsistency results from Gray opposing a petition filed by Respondent—after all, it was Respondent not Gray that “elected” to file the petition. Nor do I find any inconsistency in Gray’s attempting to preserve core Section 7 rights by filing a charge with the Board and her opposition to the petition in State court. Both actions are complimentary and no inconsistency results in attempting to enforce legal rights in two separately appropriate forums.

Similarly, I find no merit to the notion that the Superior Court is an “indispensable party.” It is questionable whether FRCP 19 even applies in Board proceedings. See *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), *Expert*

*Electric*, 347 NLRB 18 (2006). Assuming for the sake of argument that it did, the Superior Court would not meet the definition of a “party.” Respondent points to no authority which would suggest that a court, when called upon to render a decision in another forum, is somehow transformed into “party” as that term is ordinarily defined in the indispensable party context. See Fed. R.Civ.P. 19.

Respondent also takes issue with the remedies requested by counsel for the General Counsel. Respondent’s arguments run contrary to established Board precedent. As set forth in more detail below, the Board has directly addressed the identical remedial issues and found that the remedies requested by the General Counsel in this case, including the payment of the reimbursement of all reasonable expenses and legal fees with interest incurred in opposing Respondent’s unlawful state court petition, and the requirement that Respondent rescind or modify its agreements are proper. See for example, *Kenai Drilling Limited*, 363 NLRB No. 158 (2016).

The arbitration agreements by their very nature compel employees to act alone stripping them of the very support and “protection” that the Act intends to provide. It essentially deprives them of the core right to act in concert with others for “mutual aid or protection.” For the foregoing reasons, as set forth above, I find that Respondent violated Section 8(a)(1) of the Act essentially as alleged in the complaint.

### CONCLUSIONS OF LAW

1. The Respondent, Select Temporaries, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing arbitration agreements that restrict the rights of its employees to file and maintain class and collective actions.
3. At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining arbitration agreements that would reasonably be construed to prohibit employees from engaging in conduct protected by Section 7 of the Act and that interfere with the Board and its processes.
4. The above violations are unfair labor practices within the meaning of the Act.
5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Respondent has engaged in certain unfair labor practices, therefore I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's arbitration agreements are unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees (in all of its facilities in which the arbitration agreements have been implemented) that the policy does not constitute or require a waiver in all forums of their right to maintain or participate in collective and/or class actions, and that the agreements do not restrict their rights to file charges with the Board or access the Board's processes. Respondent shall notify employees of the rescinded or revised agreements by providing them a copy of the revised policy or specific notification that the agreements have been rescinded. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

Respondent shall notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement in any pending employment-related joint, class or collective actions that it has rescinded or revised the arbitration agreements and inform the tribunal that it no longer opposes the actions on the basis of the arbitration agreements. Respondent shall in the *Dioselin Gray v. Select Temporaries, Inc.*, litigation specifically inform the Superior Court of California, County of Los Angeles, Central District and the California Court of Appeals, Second Appellate District, Division 8 that it has rescinded or revised the mandatory arbitration agreements upon which it based its petition to compel arbitration and inform the tribunal that it no longer opposes the action on the basis of the arbitration agreements.

The General Counsel asks that Charging Party be reimbursed for any litigation expenses directly related to opposing Respondent's action to enforce its arbitration agreement.

Respondent argues that the award of litigation expenses is improper. The Board in *Murphy Oil* directly considered the issue and stated, "consistent with the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration. See *Bill Johnson's*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act.") In view of the Board having directly addressed the issue, and in reliance upon the Board's decision, I find that the award of litigation expenses with interest is appropriate. The applicable rate of interest on the reimbursement shall be determined as outlined in *New Horizons*, 283 NLRB 1173 (1987)

(adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

10 The Respondent, Select Temporaries, LLC, Santa Barbara, California, its officers, agents, and representatives shall

1. Cease and desist from

15 (a) Maintaining, enforcing, and/or seeking to enforce any arbitration agreements that require employees to arbitrate all employment-related claims and restrict the right of employees to file and maintain class or collective actions in all forums, arbitral and judicial.

20 (b) Maintaining arbitration agreements that would reasonably be construed to prohibit employees from engaging in conduct protected by Section 7 of the Act and that interfere with the Board and its processes.

25 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

30 (a) Rescind or revise the agreements, in all forms and places, to make clear to employees that the agreement does not constitute or require a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions and that the agreements do not bar or restrict employees' rights to file charges with the Board or otherwise access the Board's processes.

35 (b) Reimburse Charging Party, Dioselin Gray, for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's unlawful petition to compel arbitration and any other legal actions taken to enforce the agreements.

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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Notify employees of the rescinded or revised agreements by providing them a copy of the new revised agreements and/or specific written notification that the policy has been rescinded.

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(d) Notify any tribunal, arbitral or judicial where it has pursued the enforcement of the arbitration agreement in any pending employment-related joint, class or collective actions that it has rescinded or revised the arbitration agreements and inform the tribunal that it no longer opposes the actions on the basis of the arbitration agreements. Respondent shall in the *Dioselin Gray v. Select Temporaries, Inc.*, litigation specifically inform the Superior Court of California, County of Los Angeles, Central District and the California Court of Appeals, Second Appellate District, Division 8 that it has rescinded or revised the mandatory arbitration agreements upon which it based its petition to compel arbitration and inform the tribunal that it no longer opposes the action on the basis of the arbitration agreements.

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(e) Within 14 days after service by the Region, post at its facilities where the Agreement has been or is in effect, in English and Spanish copies of the attached notice marked Appendix. Copies of this notice, on forms provided by the Region Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 11, 2015.<sup>3</sup>

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(f) Within 14 days after service by the Region, mail copies of the notice to all current employees and all employees who are no longer employed but who were

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employed on or after February 11, 2015, at their last-known addresses, and provide the Region with evidence of mailing.

- (g) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 13, 2016

A handwritten signature in black ink, appearing to read 'Dickie Montemayor', written over a horizontal line.

Dickie Montemayor  
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a Union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT maintain and/or enforce arbitration agreements (the agreements) that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce arbitration agreements (the agreements) that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

WE WILL rescind the agreements at all facilities where they have been implemented and are currently in effect, or revise them in all their forms to make clear to employees that the agreements do not constitute a waiver of your right to maintain or engage in employment-related joint, class or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify our employees of the rescinded or revised agreements by providing to them a copy of the revised agreements or specific notification that the agreements have been rescinded.

WE WILL reimburse Charging Party Dioselin Gray and any other plaintiffs in the class action for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's unlawful petition to compel arbitration and dismiss class claims and other legal actions taken to enforce the agreements.

WE WILL notify any tribunal, arbitral or judicial where we have pursued the enforcement of the arbitration agreements in any pending employment-related joint, class or collective actions that we have rescinded or revised the mandatory arbitration agreements and will inform the tribunal that we no longer oppose joint, class or collective action on the basis of the arbitration agreements.

WE WILL notify the Superior Court of California, County of Los Angeles, Central District and the California Court of Appeals, Second Appellate District, Division 8 in the *Dioselin Gray v. Select Temporaries, Inc.*, litigation that we have rescinded or revised the mandatory arbitration agreements upon which we based our petition to compel arbitration and inform the tribunal that we no longer oppose the action on the basis of the arbitration agreements.

SELECT TEMPORARIES, LLC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_  
By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7351, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/31-CA-157821](http://www.nlr.gov/case/31-CA-157821) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7424.